IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY and UNITED ELECTRIC COAL COMPANIES,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

INDEX.

PAGE

Summary of Argument i

Citations ii

Opinion Below 1

Jurisdiction 1

Statement of the Case 2

Argument 3

SUMMARY OF ARGUMENT

I.

In The Absence Of A Federal Statute Of Limitations No Statute Of Limitations May Be Properly Applied To A Cause Of Action Created By Federal Law 3

II.

The True Meaning Of Chattanooga Foundry And Pipe Works v. City Of Atlanta Is That An Action Under The Federal Antitrust Laws Is Not In The Nature Of An Action To Recover A Penalty 6

III.

Following The Chattanooga Case Several Courts Of Appeals And Numerous District Courts Have Reached Decisions That Are In Conflict With The Decision Of The Court Below And Which, Until That Decision, Were Regarded As Establishing The Doctrine That Actions Under The Federal Antitrust Laws Are Not Penal In Nature 13

PAGE

IV.

In Reaching Its Decision The Court Of Appeals Made Use Of Illinois Decisions In Such A Way That It Abdicated To The Courts Of Illinois Its Exclusive Responsibility To Determine The Character And Nature Of A Federally Created Right 17

V.

The Public Interest In Enforcement Of The Antitrust Laws And In Uniformity And Certainty Of Their Application Will Be Seriously Affected If The Decision Of The Court Of Appeals Is Allowed To Stand 23

Conclusion 25

CITATIONS.

CASES.

Activated Sludge, Inc. v. Sanitary District of Chicago, 157 F. 2d 517 (CA-7), adopting opinion of District Court, 64 F. Supp. 25 (N.D. Ill.) 8

Barnes Coal Corporation v. Retail Coal Merchants Ass'n, 128 F. 2d 645, 649-650 (CA-4) 17, 18

Bauserman v. Blunt, 147 U.S. 647 ..... 18, 20, 21, 22, 23

Bell v. Morrison, 1 Pet. (26 U.S.) 351 4

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 24

Brady v. Daly, 175 U.S. 148, 154 10

Burnham Chemical Co. v. Borax Consolidated, 170 F. 2d 560, 575 (CA-9) 15

PAGE

Campbell v. Haverhill, 155 U.S. 610 ..... 3, 4, 5

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 ..... 3, 6, 10, 11, 14, 15

Chattanooga Foundry & Pipe Works v. City of Atlanta, 127 Fed. 23, 28, 29, 31, 32 (CA-6) 8, 9, 10

Chattanooga Foundry & Pipe Works v. City of Atlanta, 101 Fed. 900, 902, 906 (E.D. Tenn., S.D.) 7, 8

C. B. & Q. Railroad v. Jones, 149 Ill. 361, 375 ..... 18, 19, 20, 22

Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446, 449 16

Decorative Stone Co. v. Building Trades Council, 23 F. 2d 426, 427-428 (CA-2) 16

Dibble v. Bellingham Bay Land Co., 163 U.S. 63 ..... 20, 21, 23

Dipson Theatres, Inc. v. Buffalo Theatres, Inc. 8 F.R.D. 86, 89 (W.D. N.Y.) 16

Diversey v. Smith, 103 Ill. 378 ..... 19, 21, 22, 23

Elizabeth Arden Sales Co. v. Gus Glass Co., 150 F. 2d 988, 996 (CA-8) 16

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 23

Fazakerly v. E. Kahn's Sons Co., 75 F. 2d 110, 114 (CA-5) 14

Fleitman v. Welsbach Co., 240 U.S. 27, 29 16

PAGE

Gridley v. Barnes, 103 Ill. 211, 214 ..... 19, 20

Hansen Packing Co. v. Swift & Co., 27 F. Supp. 364, 367 (S.D. N.Y.) 16

Hicks v. Bekins Moving & Storage Co., 87 F. 2d 583, 585 (CA-9) 14

Huntington v. Attrill, 146 U.S. 657, 667, 688 10

H. J. Jaeger Research Lab v. Radio Corp., 90 F. 2d 826, 828 (CA-3) 16

Milwaukee Towne Corp. v. Loew's Incorporated, 190 F. 2d 561, 570 (CA-7) 16, 24

McCluny v. Silliman, 3 Pet. (28 U.S.) 269 ..... 3, 4, 5

Moore v. Backus, 78 F. 2d 571, 575, 576 (CA-7) 13, 14, 25

Momand v. Universal Film Exchanges, Inc., 43 F. Supp. 996, 1008 (D.C. Mass.) 16

Oklahoma v. American Book Company, 144 F. 2d 585, 587 (CA-10) 15

Pufahl v. Estate of Parks, 229 U.S. 217, 224, 227 ..... 20, 21, 23

Roseland v. Phister Mfg. Co., 125 F. 2d 417, 419 (CA-7) 8

Schreiber v. Sharpless, 110 U.S. 76, 80 13

Shelton Electric Co. v. Victor Talking Machine Co., 277 F. 433, 435 (D.C. N.J.) 15

Sullivan v. Associated Billposters and Distributors, 6 F. 2d 1000, 1008 (CA-2) 14

United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574 (CA-2) 14

PAGE

M. H. Vestal Co. v. Robertson, 277 Ill. 425, 428, 429.....19, 20

Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F. Supp. 15, 28 (S.D. N.Y.) 16

STATUTES AND TEXTS.

Section 4, Clayton Act, 15 U.S.C. Sec. 15 .....2, 9, 18, 22

Sherman Act, 15 U.S.C. Sec. 1 et. seq. 2

U.S. Rev. Stat., Sec. 1047 (Comp. Stat., 1901).....7, 8, 9, 11

U.S. Rev. Stat., Sec. 721 (Comp. Stat., 1901) 4

Ill. Rev. Stat., Chap. 83, Sec. 15 (1951) 2

Section 4469, Shannon's Tennessee Revisal (1858).....
.....7, 8, 11, 12

Section 4470, Shannon's Tennessee Revisal (1858).....
.....7, 8, 10, 11

Section 4473, Shannon's Tennessee Revisal (1858).....10, 11

60 Yale L. J. 553 (1951) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY and UNITED ELECTRIC COAL COMPANIES,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court below is reported in 191 F. 2d 912 (CA-7).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254, para. 1, (62 Stat. 928).

STATEMENT OF THE CASE.

A statement of the case is contained at page 2 of the Petition for a Writ of Certiori and in the motion presented herewith. The only question considered herein is the propriety of applying Chapter 83, Section 15 of the Illinois Revised Statutes, limiting to two years the time for commencing an action for a statutory penalty, to an action brought under Section 4 of the Clayton Act (15 U.S.C., Sec. 15) to recover damages for violations of the Sherman Act (15 U.S.C. Sec. 1, *et seq.*).

ARGUMENT.

I.

In The Absence Of A Federal Statute Of Limitations No Statute Of Limitations May Be Properly Applied To A Cause Of Action Created By Federal Law.

Since this Court decided *McCluny* v. *Silliman* in 1830, 3 Pet. (28 U.S.) 269, and *Campbell* v. *Haverhill* in 1895, 155 U.S. 610, the federal courts, without regard to the constantly increasing magnitude of national as compared to state and local public policy, have uniformly held that in the absence of a federal statute of limitations, state statutes of limitations may be applied to federally created causes of action. In 1906, Justice Holmes wrote the opinion of the Court in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390, and followed *Campbell* v. *Haverhill* without comment, in holding that a state statute of limitations was applicable to a private damage action based on violations of the Sherman Act. At none of these early dates could anyone have forecast the fecund growth of federal regulation of trade and commerce which has since been witnessed. It is only in retrospect that it is possible to see the havoc that has been wrought in the domain of private rights under the antitrust laws by the doctrine that state statutes of limitations are applicable to actions created by federal law. See "Treble Damage Time Limitations: Federalism Rampant", 60 Yale L. J. 553 (1951) which reviews the cases and discloses that one unlucky enough to be injured in Louisiana by violations of the antitrust laws must bring his action within one year, while one injured in Georgia has ten years, and that between these extremes state statutes of two, three, four, five and six years have been variously applied.

McCluny v. *Silliman* was an action for damages against the register of the United States land office for having failed to register certain lands as required by federal law. No federal statute of limitations had been supplied. The statute of the state where the action was commenced was applied without further comment on the ground that Section 34 of the Judiciary Act of 1789 (later the Rules of Decision Act) was controlling. Prior to this decision statutes of limitations of the forum had readily been applied in diversity cases. See for example, *Bell* v. *Morrison,* 1 Pet. (26 U.S.) 351. Looking backward, it would seem that this body of precedent coupled with the fact that the federal circuit courts had no original jurisdiction based on questions arising under acts of Congress but were mainly confined to cases founded on diversity of citizenship, disabled the Court from considering the ramifications of limiting the assertion of federally created rights by state law. The *McCluny* case was often followed but it was not until *Campbell* v. *Haverhill* that this Court really foreclosed further analysis of the matter.

Campbell v. *Haverhill* was a patent infringement suit and this Court, finding that no federal statute of limitations had been provided, turned, accordingly, to the Rules of Decision Act, U.S. Rev. Stat., Sec. 721 (Successor to Section 34 of the Judiciary Act of 1789) to hold that the state statute of limitations was applicable. Plaintiff argued at length that the recognition given by Congress in the Rules of Decision Act to the laws of the several states did not make such laws applicable to suits over which the state courts had no jurisdiction, that the states, having no power to create the right or enforce the remedy, had no power to limit such remedy or legislate in any manner affecting

the subject matter. By this date, however, the thinking on the question had long been conditioned to the contrary. Justice Brown simply passed over the analysis by labeling it a distinction and not a difference (p. 615) which, although cryptic, does not seem to provide a satisfying rationale. He concluded (p. 618) that statutes of limitations affect the remedy only and do not impair the right.

It is respectfully submitted that the dichotomy between right and remedy is patently a fiction that has outworn its usefulness, at least, certainly, in connection with a matter that vitally affects the administration of such important federal legislation as the antitrust laws. A right without a remedy is devoid of meaning or content. A right which extends in time for one year is not the same as a right which extends in time for ten years. To say that the remedy does not affect the right would seem to be simply to disregard realities.

Moreover, the scope of both federal legislation and federal jurisdiction has been so enormously widened since this court considered the *McCluny* and *Campbell* cases that the entire matter should be re-examined.

The consequences of these early cases are that private rights under the federal antitrust laws have been distorted into a patchwork of disparate rights, depending upon which state they happen to be asserted in. It is not, however, too late to rectify the harm that has been done. *Amici curiae* respectfully suggest that this Court may take judicial notice that in recent decades it has often revised earlier positions on various questions in conformity with a better perspective produced by later day realities and needs.

II.

The True Meaning Of Chattanooga Foundry And Pipe Works v. City Of Atlanta Is That An Action Under The Federal Antitrust Laws Is Not In The Nature Of An Action To Recover A Penalty.

In its opinion below, the Court of Appeals disposed of *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390, by the following language (p. 914):

> "We think plaintiff's reliance upon *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 is misplaced. The court held that no federal limitation existed; that the applicable statute was that of Tennessee; and, approving Judge Lurton's analysis of the decisions of that state, that the pertinent limitation was 10 years."

What was said about the case in the foregoing quotation is true enough, but it does not tell the whole story. *The point of the entire Chattanooga litigation was that if the character of the action was penal, then the federal statute of limitations applicable to such actions would have been controlling.* The trial court held that the character of the action was not penal and was, therefore, controlled by a particular section of the local statute of limitations rather than the federal statute. The Circuit Court of Appeals agreed that it was not penal and was, therefore, controlled by the local statute of limitations, but disagreed with the trial court as to which section of the local statutes applied. The Supreme Court likewise agreed that it was not penal so the federal statute did not apply, and affirmed the Circuit Court of Appeals' decision as to which section of the local statute applied.

That, in brief, is the story of the *Chattanooga* litigation, but it is so crucial to the determination of this matter and

to the status of federal antitrust suits, that *amici curiae* ask the Court's forbearance while they undertake to recapitulate the story in detail from the trial court through the Supreme Court.

The opinion of the trial court reported at 101 Fed. 900 (E. D. Tenn., S.D., 1900) discloses that defendants raised the defense of the Tennessee statute of limitations, asserting that either Section 4469 or Section 4470 of Shannon's Tennessee Revisal applied—the former section prescribing a one-year limitation to actions for *statute penalties*, injuries to the person and certain other civil wrongs, and the latter prescribing a limitation of three years for injuries to real and personal property. Plaintiff maintained that the federal five year statute of limitations relating to actions for any penalty or forfeiture accruing under the laws of the United States was applicable (U.S. Rev. Stat. Sec. 1047).

The Court pointed out at the outset (p. 902) that if the action were in its nature and substance for a penalty or forfeiture, then the federal statute applied. It analyzed in broad scope and in great detail the nature of actions for penalties (pp. 902-906) and, after noting that the Sherman Act provided for criminal punishment as well as a civil remedy for damages, stated (p. 906):

> "It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares."

The Court then concluded (p. 906):

> "These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions [under Section 7 of the Sherman Act] are remedial and compensatory only."

After having decided in the first place that the suit was not penal in character, the Court did not even consider that Section 4469 of Shannon's Tennessee Revisal, prescribing a one year limitation to suits for statute penalties might be applicable, and went on to determine that Section 4470 prescribing a three year limitation to suits for injuries to personal property was applicable.

It is inescapable that the Court decided that the nature of the suit was not penal. Indeed, it is striking that in 1942 the Court below, in *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417, 419 (CA-7), relying on the trial court's opinion in the *Chattanooga* case, decided at that time that a treble damage action under the anti-trust laws is not penal. Moreover, it should be noted that in 1946 the same court, in *Activated Sludge, Inc.* v. *Sanitary District of Chicago*, 157 F. 2d 517 (CA-7) adopting the opinion of the District Court, 64 F. Supp. 25, 36, again said that such an action is not penal in nature.

When the *Chattanooga* case was presented to the Circuit Court of Appeals, 127 Fed. 23 (CA-6) Judge Lurton said at the outset (p. 28):

> "If this is an action to recover a penalty, within the meaning of this statute [Section 1047 U.S. Revised Statutes] The suit was in time. The shorter statute of the state, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no federal statute that the limitation prescribed by the law of the State is applicable."

Judge Lurton's reasoning is apparent. In no event could the Tennessee "statute penalties" provision be applicable, because if the character of the action was penal, then the federal five year statute applied, and resort to the state limitations act would be unnecessary. However, if the federal limitations act did not apply, which is what Judge Lurton held, the reason was that a treble damage action under the antitrust laws was not penal in character; accordingly, a state statute governing such actions could likewise have no application.

There is not the slightest question that Judge Lurton held that the suit was not penal. He said (at p. 28):

> "We find ourselves in agreement with the Court below in holding that an action under the seventh section of the Act of July 2, 1890, c. 647, 26 Stat. 210 [U.S. Comp. St. 1901, p. 3202] is not a penal action."

And at p. 29 he explained his reasoning:

> "It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damages sustained. But this enlargement of compensation is not enough to constitute the action a penal action within the meaning of Section 1047, Rev. Stat. [U.S. Comp. St. 1901, p. 72]."

Having decided that the federal statute was not applicable because the suit was not a penal action, Judge Lurton turned to the question of which section of the local statute was applicable. He did not even discuss the meaning of the state provision governing "statute penalties", having already concluded that no such provision could be applicable since if the character of the action was penal, the

federal rather than the state limitations provision would apply. The trial court, he pointed out, had applied section 4470 of Shannon's Tennessee Revisal prescribing a three year limitation to "actions for injuries to personal or real property." He decided, however, that the action was covered by Section 4473 prescribing ten years in "cases not expressly provided for". At p. 31, Judge Lurton said:

> "Actions on statute liabilities, *not being a statute penalty,* and not dependent upon any contract, express or implied, are actions not otherwise expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." (Italics Supplied)

And, concluding his opinion, he said, at page 32:

> "We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years."

Accordingly, Judge Lurton reversed because the trial court had held the action was barred in three years under Section 4470.

When the case came on to the Supreme Court (203 U.S. 390), Justice Holmes had before him exactly the same problem as had the two lower courts. He had to decide whether the federal statute of limitations was applicable, and if not, which section of the local statute was. *He determined at the outset that there was no federal statute applicable, and the reason he so determined was that he concluded that the action was not penal in character.*

If there is any doubt about Justice Holmes having decided the question, the doubt is resolved by reference to the two cases he cited in that connection, *Huntington* v. *Attrill,* 146 U. S. 657, and *Brady* v. *Daly,* 175 U. S. 148. These cases are extended discussions of when a suit is not penal in nature, the former under state created law, and

the latter under federally created law. If Justice Holmes was deciding anything other than that the suit was not penal, there was no point in citing these cases.

Furthermore, in passing to a consideration of the Tennessee limitations statute, Justice Holmes refused to apply the Tennessee "statute penalties" provision, although noting that it was somewhat different from the federal provision. The reason he gave for dismissing the Tennessee "statute penalties" provision from consideration was that he had to adhere to the construction of an action for treble damages under the antitrust laws which he had already adopted in deciding that the federal limitations provision was not applicable; namely (it must be taken) that the action was not penal in character. He said (p. 397):

> "As to the article touching actions for statute penalties, notwithstanding some grounds for distinguishing it from Rev. Stat. Sec. 1047, which were pointed out, *so far as this liability under the laws of the United States is concerned we must adhere to the construction of it which we already have adopted.* The chief argument relied upon is that this suit is for injury to personal property, and so within Article 2773." (Italics Supplied.)

Thus, having decided that neither the federal penalty statute (U. S. Rev. Stat. Sec. 1047) nor the local penalty statute (Shannon's, Sec. 4469; Tenn. Laws, Art. 2772) had any application because the action was not penal, Justice Holmes was left with the question of whether the trial judge or Judge Lurton had applied the proper local statute. The trial judge had applied Section 4470 controlling injuries to real or personal property, and Judge Lurton had applied Section 4473 controlling actions not otherwise provided for. Justice Holmes affirmed Judge Lurton's construction of the local law, since, as he pointed out, Judge Lurton had long experience on the Tennessee Supreme Court.

Judge Lurton did not make any analysis of the "statute penalties" provision of the Tennessee statutes (Shannon's, Sec. 4469). He found that unnecessary to do, since he had determined initially that the action was not penal and, therefore, the federal limitations provision did not apply. And, since the action was not penal, the local "statute penalties" provision could in no way be conceivably applicable. The only state statutes which Judge Lurton's opinion purported to construe, were the local ten year and the local three year provisions. In "approving Judge Lurton's analysis of the decisions" of Tennessee (contrary to the opinion of the Court below, p. 914), Justice Holmes could not, therefore, have relied on any analysis by Judge Lurton of the Tennessee "statute penalties" provision, since no such analysis was made. Accordingly, it cannot be inferred that in reaching a decision Justice Holmes merely interpreted the meaning of both the Federal and Tennessee limitations provisions governing penal actions, rather than passing on the underlying question of whether the action was penal in character.

Amici curiae submit that it is inescapable, first, that Justice Holmes determined that the suit was not penal in nature, and, second, that he had to so determine in order to make his decision, for if the suit were penal, then the federal statute would have been applied, and Justice Holmes would never have been called upon to turn to the local law to pass upon which section applied. Moreover, the suit not being penal in character, it was unnecessary to analyze the local "statute penalties" provision, since in no event could that have been applicable.

III.

Following The Chattanooga Case Several Courts Of Appeals And Numerous District Courts Have Reached Decisions That Are In Conflict With The Decision Of The Court Below And Which, Until That Decision, Were Regarded As Establishing The Doctrine That Actions Under The Federal Antitrust Laws Are Not Penal In Nature.

There are two large classes of federal antitrust cases in which the decisions have turned upon the question of whether the action is in the nature of one to recover a penalty. In the one class of cases the answer to the question determines whether the action survives the death of a party and also whether it may be assigned. In the other class of cases, the answer determines whether a statute of limitations relating to actions to recover statutory penalties applies or whether some other statute of limitations applies. In both classes of cases, the federal courts have consistently taken the position that the action is not in the nature of one to recover a penalty. These cases will be considered together as establishing the same proposition; namely, that the character of the action is not penal.

Survivorship Cases.

It has long been well established that actions on penal statutes do not survive. *Schreiber* v. *Sharpless,* 110 U.S. 76, 80. In *Moore* v. *Backus,* 78 F. 2d 571, 575, 576 (CA-7), the Court below held that a treble damage action under the antitrust laws survived the death of the injured party. It reached this result by analyzing applicable federal decisions, but also determined that even on the basis of Illinois law, its decision would have been the same. The thrust of the decision is that the action was not in the nature of one

to recover a penalty or it would not have survived. *Consequently, if the court below is not reversed, the decision will have overruled sub silentio Moore* v. *Backus.*

In *Hicks* v. *Bekins Moving and Storage Co.*, 87 F. 2d 583, 585 (CA-9), which was an action for treble damages arising under the federal antitrust laws, the Court, relying on *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* determined that such an action was not one for a penalty, and, therefore, survived the death of the injured party and was assignable. The decision is in accord with *Moore* v. *Backus* and with *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574 (CA-2), in which it was held that the action was assignable, and also that it survived as against the estates of deceased persons. In that case, the court said (p. 577):

> "There can, of course, be no pretense that Section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being treble."

In *Fazakerly* v. *E. Kahn's Sons Co.,* 75 F. 2d 110, 114 (CA-5) that Court followed the *United Copper Securities Co.* case, thereby vitiating two District Court opinions to the contrary in the Fifth Circuit. These two District Court opinions [*Caillouet* v. *American Sugar Refining Co.,* 250 Fed. 639 (E.D. La.) and *Bonvillain* v. *American Sugar Refining Co.,* 250 Fed. 641 (E.D. La.)] had been cited to Judge Sparks in *Moore* v. *Backus,* but he declined to follow them, pointing out the unsoundness of their reasoning (pp. 575-576). Again, in *Sullivan* v. *Associated Bill Posters and Distributors,* 6 F. 2d 1000, 1008 (CA-2) the Court, in holding that a cause of action under the Clayton Act survives, determined that the action was remedial and not penal.

Statute of Limitations Cases.

In eight cases, federal courts have applied to a treble damage action arising under the antitrust laws a state limitations statute governing actions upon a liability created by statute other than a penalty or forfeiture and have declined to apply the shorter state provision controlling actions upon a statute for a penalty or forfeiture.

In *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (CA-9), the Court stated under the heading "Appellees' Contentions (A)" (page 575):

> "(A) On the face of the complaint this is a civil private action for damages arising under the Federal antitrust laws (Sherman Act) and is therefore an action upon a liability created by statute other than a penalty or forfeiture. . ."

And at page 578, the Court approved the contention, saying:

> ". . . the contentions of appellees as to the facts and the law are fully supported and the judgment of the lower court must be sustained."

In *Oklahoma* v. *American Book Company,* 144 F. 2d 585, 587 (CA-10) the Court held that the following Oklahoma statute (O.S. 1941, Sec. 95) was applicable to a treble damage action under the antitrust laws:

> "Second. Within three years: an action upon a contract express or implied not in writing; an action upon a liability created by statute *other than a forfeiture or penalty.*" (Italics Supplied)

In *Shelton Electric Co.* v. *Victor Talking Machine Co.,* 227 Fed. 433, 435 (D.C. N.Y.) the Court, relying on *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* refused to apply a New Jersey limitations statute governing penal actions, saying:

> "The treble damages which the complaint seeks to recover are neither a penalty or a forfetiure, but merely treble damages allowed by the law for the redress of a private injury."

The additional cases are:

Hansen Packing Co. v. *Swift & Co.*, 27 F. Supp. 364, 367 (S.D. N.Y.);

Momand v. *Universal Film Exchanges, Inc.*, 43 F. Supp. 996, 1008 (D. C. Mass.);

Dipson Theatres, Inc. v. *Buffalo Theatres, Inc.*, 8 F.R.D. 86, 89 (W.D. N.Y.);

Christensen v. *Paramount Pictures, Inc.*, 95 F. Supp. 446, 449 (D. C. Utah);

Winkler-Koch Engineering Co. v. *Universal Oil Products Co.*, 100 F. Supp. 15, 28 (S.D. N.Y.).

Cases Distinguished.

The Court of Appeals in its opinion below stated (p. 914) that "no solace is to be found in federal decisions involving causes of action such as the one asserted here." The Court then noted that there were five cases "referring to such a recovery as 'a penalty' . . ." It is respectfully submitted that in view of the analysis of the *Chattanooga* case here presented, and in view of the numerous decisions cited in this section which are square holdings on the point, that the five decisions should be reevaluated. An examination of each at the page indicated will disclose that in none was the reference to a penalty required in order to reach the decision, but rather appears to be a gratuitous characterization which the Judge happened to make in passing.

Fleitman v. *Welsbach Co.*, 240 U.S. 27, 29;

Milwaukee Towne Corp. v. *Loew's Incorporated*, 190 F. 2d 561, 570 (CA-7);

H. J. Jaeger Research Lab. v. *Radio Corp.*, 90 F. 2d 826, 828 (CA-3);

Decorative Stone Co. v. *Building Trades Council*, 23 F. 2d 426, 427-428 (CA-2);

Elizabeth Arden Sales Co. v. *Gus Blass Co.*, 150 F. 2d 988, 996 (CA-8).

IV.

In Reaching Its Decision The Court Of Appeals Made Use Of Illinois Decisions In such A Way That It Abdicated To The Courts Of Illinois Its Exclusive Responsibility To Determine The Character And Nature Of A Federally Created Right.

Any consideration of the effect of a state statute of limitations on an action created by federal law must begin with a description of the proper method of characterization of the federal action, since it is the character and nature of the action which determines the applicable statute of limitations (See Petition for Certiorari, p. 10). An excellent example of cases setting forth the proper method is *Barnes Coal Corporation* v. *Retail Coal Merchants' Ass'n.*, 128 F. 2d 645 (CA-4). This was a treble damage action under the federal antitrust laws. The Virginia Code, which contained the applicable statute of limitations, provided a five year period for actions which survived the death of a party, and a one year period for actions not of such nature. In ruling that the five year limitation period applied, the Court described the method of determining the applicable statute of limitations as follows (pp. 649-650):

> "Defendants argue that, although the cause of action be held to survive under a proper interpretation of the federal statute creating it, it would not survive under the rule of the Virginia law if created by a state statute of like import, and, therefore, is not an action which survives within the meaning of the State statute of limitations. The test prescribed by the statute of limitations, however, is survivability; and this must mean survivability under the law relating to the cause of action, since no test of survivability is prescribed by the statute of limitations. If it be said that the statute of limitations presumably has reference to causes of action created by state laws, the answer is that it is being applied here to a cause of action created by federal statute and that the essential attributes

of that cause of action can be determined only in the light of the federal law."

In its decision below, the Court of Appeals took the position that the Illinois Supreme Court has previously interpreted the meaning of the phrase "statutory penalty" as used in the Illinois two year limitations provision, that the meaning given to the phrase by the Illinois Court required the inclusion of the kind of action asserted by plaintiff in this case, and since under the doctrine of *Bauserman* v. *Blunt,* 147 U.S. 647, a federal court will adhere to a state court's construction of the state's statute of limitations, the Court was bound to apply the two year statute to the action under Section 4 of the Clayton Act. It is the view of *amici curiae first,* that the Illinois cases (discussed below) simply characterized the substantive nature of certain Illinois created actions but did not construe the meaning of the phrase "statutory penalty" as used in the two year limitations provision so that, therefore, the doctrine of *Bauserman* v. *Blunt* is irrelevant; and, *second,* the doctrine of *Bauserman* v. *Blunt* was misapplied by the Court of Appeals since the doctrine does not require or permit a federal court to look to state law in characterizing the substantive nature of a federally created right.

First. In the three Illinois cases referred to by the Court of Appeals in which a statute of limitations question arose, the Illinois court simply followed the usual method (pointed out in the *Barnes* case) for applying a limitations statute to a cause of action. It first analyzed the Illinois law under which the actions arose and then characterized the law as penal. Having made this characterization it followed automatically that the Illinois two year limitations statute relating to penalties would be applicable and, consequently, the Court in each case applied that statute.

In *C.B.& Q. RR* v. *Jones,* 149 Ill. 361, the Illinois Supreme Court (p. 375), before even considering the statute of limitations question which the case presented, and in connection with the construction of the Act to prevent un-

just discrimination and extortions in railroad rates (Ill. Rev. Stat. 1889, Chap. 114, Sections 124-133) determined that the Act was penal in nature. Having reached that conclusion, the Court applied, as a matter of course, the Illinois limitations statute governing penalties. There was no necessity for the Court to construe the meaning of the phrase "statutory penalty" as used in the two year limitations statute, and the Court did not, in fact, do so. The only Illinois statute which the Court purported to construe in that case was the substantive statute governing railroad rate discriminations under which the cause of action arose.

The same method was also followed by the Illinois court in applying the limitations statute in *Vestal Co.* v. *Robertson*, 277 Ill. 425, 428, 429, and in *Gridley* v. *Barnes*, 103 Ill. 211, 214. In the former case, the Court concluded that Section 18 of the Illinois Corporation Act was penal, and in the latter case, that Section 16 of the Insurance Law was penal. Having reached these determinations, again the Court, as a matter of course, applied the two year limitations statute.

In *Diversey* v. *Smith*, 103 Ill. 378, the last Illinois case cited by the Court of Appeals, the Illinois court did not mention, let alone discuss, the two year limitations statute which the Court of Appeals held to be applicable in its decisions below. Nothing in that case can, therefore, be regarded as interpreting the phrase "statutory penalty" in Section 15 of the Illinois Limitations Act. *Diversey* v. *Smith*, at most, sets up guide posts to be followed in determining whether the nature and character of an Illinois statute creating a substantive right is penal.

It therefore seems clear that the Court of Appeals was mistaken in its view (p. 914) that "the intent of the phrase, statutory penalty, has been determined by the Su-

preme Court of Illinois in *C.B. & Q. RR. Co.* v. *Jones*, 149 Ill. 361", and "adhered to . . . in *Vestal Company* v. *Robertson*, 277 Ill. 425 and *Gridley* v. *Barnes*, 103 Ill. 211."

Since the phrase "statutory penalty" as used in the Illinois two year limitations provision has not been interpreted by the Illinois Supreme Court, the doctrine of *Bauserman* v. *Blunt* was, accordingly, irrelevant in this case, and the Court of Appeals should not have undertaken to make use of it in reaching its decision.

Second. The doctrine of *Bauserman* v. *Blunt* was misapplied by the Court of Appeals. There is nothing in the *Bauserman* case or in the cases cited by that Court as following it (*Dibble* v. *Bellingham Bay Land Co.*, 163 U.S. 63, and *Pufahl* v. *Estate of Parks*, 299 U.S. 217) which either requires or permits a federal court, in characterizing a federally created action for the purpose of applying to it a state statute of limitations, to look to state court decisions characterizing a similar or even identical state created action.

The *Bauserman* and *Dibble* cases stand for the proposition that in a diversity case (*Bauserman*) or a state court proceeding (*Dibble*) where a local statute of limitations is applicable, its meaning is determined by state court decisions. In neither of those cases was it necessary, as it is in this case, to determine the nature of the cause of action asserted as a preliminary step in ascertaining which of several limitations provisions should be applied. Even if in those cases it had been necessary to determine the nature of the cause of action, it would have been quite proper to do so under state decisions since in both cases, unlike the situation presented here, a state created right was involved.

In the *Pufahl* case, the receiver of a defunct national bank filed a claim in a local probate court under authority of a

federal statute against a decedent's estate to recover upon the decedent's statutory liability as a stockholder of the bank. The Court held only that the local probate court procedure as provided by state law, including the time in which claims were required to be filed, was applicable to an action instituted in that court regardless of the fact that the right asserted was created by federal law. It is significant to note that in the *Pufahl* case the nature of the claim asserted was determined under federal law (p. 224) before the local claim statute was applied (p. 227).

In none of these three cases was the character and nature of a federally created right ascertained by reference to state decisions, nor was it necessary (in *Bauserman* or *Dibble*) for the court to make a choice of one of several state limitations statutes (in *Pufahl*, the choice was readily made once the nature of the action was determined). Hence, they were not really in point in this case.

The misuse of these cases by the Court of Appeals in reaching its decision is highlighted by the manner in which it felt itself required to utilize *Diversey* v. *Smith*, 103 Ill. 378, a case in which the two year statute of limitations was neither mentioned nor discussed. The court said (p. 914):

> "In view of the close analogy between the cause of action there involved and one arising under Section 4 of the Clayton Act the decision would seem to be controlling. Each is an action to recover treble damages, costs and attorneys fees, for violation of a statute. *In each, threefold damages and attorneys fees are in the nature of a penalty.* When 'the object is clearly to inflict a punishment on a party for violating' the statute, it is penal in character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant. *Diversey* v. *Smith*, 103 Ill. 378." (Italics Supplied).

The Court of Appeals thus drew an analogy between the action asserted in the *C.B. & Q. RR.* case, and the action under Section 4 of the Clayton Act because, as the Court explained (p. 914): "In each, threefold damages and attorneys fees are in the nature of a penalty." However, since the validity of the analogy depended on the existence of this similarity, it is pertinent to ask how the Court arrived at the proposition that in an antitrust action the threefold damages and attorneys fees are in the nature of a penalty. It is no answer to say that first the Court determined that an action under Section 4 of the Clayton Act was like the action in the *C.B. & Q. RR* case, and since in that case it had been determined that the action there asserted was penal in nature, therefore it followed that the action under Section 4 was penal in nature. The Court simply did not say that, and in view of what else it said, it could not have intended that. The analogy it drew was based upon the initial proposition that in both instances the action was in the nature of a penalty. To that point, no reference had been made which indicated any basis upon which the Court was entitled to characterize an action under Section 4 of the Clayton Act as penal in nature. It thereupon reached out beyond statute of limitations actions in order to create such a basis, characterizing the action as penal by reference to *Diversey* v. *Smith*, a case in which the two year statute of limitations was not involved. Had the Court recognized at that point that what it was really doing was characterizing the nature of the action and not interpreting a statute of limitations pursuant to the *Bauserman* doctrine, it should then have turned to the applicable federal decisions and reached the result that the nature of the action was not penal. Such a result, however, would not have afforded an analogy to *C.B. & Q. RR.* v. *Jones*, in which event the Court could not have decided that it had before it an analogy which compelled

the conclusion that the two year statute of limitations was applicable.

Amici curiae conclude that the use made of *Diversey* v. *Smith* by the Court of Appeals in its decision below is not within the permissible scope of the doctrine of *Bauserman* v. *Blunt* as shaped by the facts in that case and in the *Dibble* and *Pufahl* cases. In effect, what the Court of Appeals did was to abdicate to a state court its exclusive responsibility to determine the nature and character of an action created by federal statute.

V.

The Public Interest In Enforcement Of The Antitrust Laws And In Uniformity And Certainty Of Their Application Will Be Seriously Affected If The Decision Of The Court Of Appeals Is Permitted To Stand.

The Petition for a Writ of Certiorari (p. 13) sets forth the wide public importance that attaches to the question of whether suits under the federal antitrust laws are to be restricted by state statutes of limitations applicable to penal actions.

Amici curiae invite the Court's attention to the fact that finding facts and evaluating them in order to determine whether to bring an action may be particularly difficult in the antitrust field. See Hearings before Subcommittee of Senate Committee on the Judiciary on S. 1910, 81st Cong., 1st Sess. 2-10, 16-30, 33-39, 63-64, 70-78 (1949) (Test. of Thurman Arnold and George B. Burnham). In addition, the time and expense required in prosecuting a treble damage action is very often so great that if the recovery of damages is limited to two years the time and expense involved, let alone the risk of non-recovery, will foreclose numerous meritorious suits. For example, in *Emich Motors Corp.* v. *General Motors Corporation*, 340

U.S. 558, plaintiffs' expenses, exclusive of attorneys fees, amounted to more than $23,500.00, and the record discloses that the claim of attorneys for fees was based on 8,477 hours in the preparation and trial of the case. In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 plaintiffs expended, exclusive of attorneys fees, more than $20,000.00, and the attorneys devoted more than 1,300 hours to the trial and preparation of the case. And in the recent case of *Milwaukee Towne Corp.* v. *Loew's Incorporated*, 190 F. 2d 561 (CA-7) plaintiff's expenses, exclusive of attorneys fees, were $10,914.57 and its attorneys devoted 2,388 hours to the case.

These cases are typical of the immense expenditure of time and money demanded in prosecuting a treble damage action of any magnitude. It seems apparent that limiting the recovery of damages in such cases to two years would virtually eliminate most of them, thereby likewise eliminating the chief deterrent to violators of the antitrust laws and ruining the present structure of antitrust enforcement.

Moreover, it should be noted that when Congress enacted the antitrust laws it established a policy applicable to everyone. If Congress intended these laws to be punitive, they should be everywhere punitive. If Congress intended these laws to be compensatory, they should be everywhere compensatory. To conceive of federal law as violating the policy of a state is to lose sight of the Constitution. Within the area of federal power, Congress is supreme. Its laws and the policies they express take precedence over contravening state laws and policy.

If the antitrust laws may be treated as penal in nature under the guise of giving free play to the policies of a particular state then their application becomes unreasonably discriminatory and federal policy becomes subordinate.

Hower, as the court below has itself said:

> "The [Sherman] Act is quite general in its nature, and its successful enforcement would seem to require a uniform interpretation in its application. . ." *Moore* v. *Backus*, 78 F. 2d 571, 575 (CA-7)

Any attempt at uniform application is necessarily stultified by treating private actions under the antitrust laws as anything other than remedial and compensatory, whether for purposes of determining the applicability of a particular statute of limitations or whether for any other purpose.

CONCLUSION.

In view of the analysis of the *Chattanooga* litigation presented herein; in view of the conflict created among the circuits by the decision of the Court of Appeals; in view of the extent to which that decision cuts into hitherto well established federal doctrine; in view of the confusion created by the manner in which the Court permitted federal policy to be subordinated to state policy; and in view of the paramount public importance of preserving the vitality of the antitrust laws, *amici curiae* respectfully urge that the Petition for a Writ of Certiorari be granted and that the decision of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

Seymour F. Simon
Francis Heisler
David J. Shipman
Eugene H. Dupee, Jr.
John F. Sullivan
Sheldon O. Collen
As Amici Curiae